

JAMES LELAND WALLACE

IBLA 86-296

Decided November 30, 1987

Appeal from a decision of the Nevada State Office, Bureau of Land Management, cancelling a certificate for an Indian allotment. N-13190.

Affirmed as modified.

1. Act of February 8, 1887 -- Indians: Lands: Allotments on Public Domain: Generally -- Secretary of the Interior

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

2. Act of February 8, 1887 -- Indians: Lands: Allotments on Public Domain: Settlement

Where BLM has classified certain lands for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), and issued a certificate of allotment, it may establish a reasonable time in which the allottee must demonstrate settlement of the land in question. Two years from issuance of the certificate is such a reasonable time.

3. Act of February 8, 1887 -- Indians: Lands: Allotments on Public Domain: Settlement

Where lands are classified for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), as irrigable lands and a certificate of allotment issued, settlement of those lands must include acts to establish the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question.

APPEARANCES: Linda Anisman, Esq., Bishop, California, for appellant.

# OPINION BY ADMINISTRATIVE JUDGE HARRIS

James Leland Wallace (Wallace) has appealed from a December 19, 1985, decision of the Nevada State Office, Bureau of Land Management (BLM), cancelling a certificate of allotment issued under section 4 of the General Allotment Act of February 8, 1887, as amended, 25 U.S.C. § 334 (1982). On August 2, 1976, Wallace applied for an allotment of 160 acres of land in Fish Lake Valley, Nevada, described as the SW 1/4 sec. 9, T. 4 S., R. 36 E., Mount Diablo Meridian. 1/ Following a field investigation, BLM notified Wallace by letter dated October 6, 1977, that he would "only be entitled to 40 acres of irrigable land within the SW 1/4", 2/ that land being the NW 1/4 SW 1/4, and that he should relinquish the remaining acreage. On October 19, 1977, Wallace filed a relinquishment form describing the remaining 120 acres as the E 1/2 SW 1/4 and the SW 1/4 SW 1/4 sec. 9.

In a land report dated December 22, 1977, a BLM realty specialist recommended that the NW 1/4 SW 1/4 sec. 9 be classified for disposition under the General Allotment Act. His rationale is set forth at page 5 of that report, as follows:

The applicant's private alfalfa lands consisting of 320 acres of irrigated land border the subject land to the north. At present the applicant's sole income is derived from his farming operation.

The subject land consisting of 40 acres does not meet the criteria of an economic unit. However, the applicant's private lands in conjunction with the subject land would meet the economic criteria of Washington Instruction Memo No. 75-638. [3/]

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1/ On June 9, 1977, Wallace filed with the State of Nevada an application to appropriate water for irrigation. Among the land identified in the application to be irrigated was the SW 1/4 sec. 9.

2/ Under the General Allotment Act (see 25 U.S.C. § 331 (1982)) and Departmental regulation 43 CFR 2530.0-8(a) allotments may not exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.

3/ The instruction memorandum cited by BLM related to "Economic Unit Criteria for Desert Land Applications." That memorandum stated:

"Desert land applications filed on small acreages adjoining private agricultural land of an applicant present a special problem in determining economic feasibility. Independent agricultural development of the land under application probably would not be economically feasible. When considered as supplemental to the existing farm operation, however, the proposal may become profitable.

"Sufficient return to support a family is not necessarily required. Primary importance is placed on a determination that the land can be developed

The applicant would incorporate the subject land into his present operation. The acquisition of the subject land by the applicant would not only allow him to expand his present operation, but he also possesses the equipment, well water, and expertise to reclaim that land for agricultural production.

The subject land is suitable for cultivation with the aid of irrigation.

BLM found the 40 acres suitable for disposition under the Act by initial classification decision dated February 7, 1978. <sup>4/</sup> Subsequently, on June 5, 1979, BLM issued a certificate of allotment.

Prior to issuance of the certificate, the Nevada State Engineer, on March 31, 1978, denied Wallace's application to appropriate irrigation water for the allotment. On July 13, 1979, Wallace sought a reclassification of the entire 160 acres "as grazing land since it can no longer be irrigated without water permits." In response, BLM directed Wallace to file a new application and petition for classification for the 120 acres previously relinquished. Wallace filed a new application and petition on November 28, 1979, for the 120 acres. <sup>5/</sup>

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fn. 3 (continued)

into a profitable operation on a permanent basis. The law, regulations or manual do not specifically address this question.

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"This philosophy is supported by the Secretary's decision on Ewing T. Skinner, A-30468 (April 5, 1966), that approximately 50 acres of desert land could be allowed "... where it appears that he plans to develop the desert land in conjunction with an existing farm operation." Quoting further from the decision: "It may well be that such an operation is economically desirable, while the cultivation of such an entry might not be economically feasible if it were to stand alone as a farming unit."

"Therefore, in situations where desert land applications are proposed for development in conjunction with private lands of the petitioner-applicant, the private lands should be considered in judging the economic feasibility of the proposal."

BLM applied this desert land entry application policy to Wallace's Indian allotment application.

<sup>4/</sup> The classification regulation in effect in 1979 (and still in effect), 43 CFR 2430.5(f), provides that lands can be classified for Indian allotment if four criteria are met: (1) The lands are valuable for agricultural purposes; and (2) the lands are on the whole suitable for a home for an Indian and his family, and (3) the anticipated return from agricultural use of the land would support the residents, and (4) the requirements for water supplies set forth in 43 CFR 2430.5(d) are met. It is apparent that BLM considered Wallace's private lands in conjunction with the lands in question in classifying the 40 acres for Indian allotment.

<sup>5/</sup> In a letter received by BLM on Sept. 22, 1982, inquiring about the status of his allotment, Wallace stated:

In a December 26, 1984, land report relating to five separate Indian allotment applications, including N-13190, BLM stated at page 1:

At one point, the applicant under N-13190 amended his application to request 40 acres of irrigated land, the third Indian allotment option. At that time, 1977, the Las Vegas District Manager felt that classification of this 40 acres as suitable for Indian allotment as irrigated farm land was appropriate. However, prior to consummation of the allotment and issuance of a trust deed, the Nevada State Engineer denied water for irrigation of the parcel. Since then, Fish Lake Valley has been treated as a designated groundwater basin, ruling out appropriation of additional waters for agriculture. It is Bureau policy, in coordination with the State of Nevada, that no agricultural entries, including irrigated Indian allotments, are to be allowed in closed or designated groundwater basins. Therefore, issuance of an Indian allotment in Fish Lake Valley for irrigated farming is not possible due to lack of water.

Although the applicants could probably put the subject lands to some net productive use, it appears impossible that any family could be supported on the acreage allowed under the Act, due to low land productivity, coupled with lack of water.

Thereafter, on July 7, 1985, BLM issued a proposed classification decision finding the 120 acres sought by Wallace for grazing land unsuitable for entry under the General Allotment Act. On the same day BLM issued a decision vacating its February 7, 1978, decision classifying the NW 1/4 SW 1/4 sec. 9 suitable for an Indian allotment. BLM stated that the water in Fish Lake Valley was over-appropriated and the land in question could not be irrigated. Wallace protested BLM's action. On October 7, 1985, BLM vacated the July 7, 1985, decision relating to the NW 1/4 SW 1/4 sec. 9. BLM stated that it was inappropriate to vacate a classification when there was an existing certificate of allotment covering the land. However, on October 9, 1985, BLM issued an initial classification decision declaring the S 1/2 SW 1/4, NE 1/4 SW 1/4 sec. 9 unsuitable for entry under the General Allotment Act. There is no evidence in the file that Wallace sought review of that decision in accordance with 43 CFR 2450.5.

On December 19, 1985, BLM cancelled the certificate of allotment relating to the NW 1/4 SW 1/4 sec. 9, providing two reasons for its action: the State's denial of the application to appropriate water and Wallace's failure to establish "residency" on the subject land within two years of issuance of the certificate of allotment.

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fn. 5 (continued)

"As you know, because of the closure of the water basin in Fish Lake Valley, our request for 40 acres of irrigatable farm land must be changed back to our original request for 160 acres of grazing land because obviously the land cannot be irrigated." [Emphasis in original.]

Wallace appealed, claiming first, that there are no provisions in the applicable statutes or regulations for cancelling a certificate of allotment once it has been granted; second, that there is no requirement that the recipient of a certificate of allotment make settlement and apply for a trust patent or fee patent within any particular period of time; and finally, that, in any event, he made settlement on the property.

[1] Appellant is correct in his assertion that neither the General Allotment Act, as amended, nor the pertinent regulations at 43 CFR Part 2530 specifically provide for the cancellation of a certificate of allotment. Nevertheless, that does not mean that BLM was without authority to do so.

In his role as custodian of the public lands, the Secretary of the Interior has plenary authority over the public lands while they remain in public ownership, and he is charged with seeing that they are not disposed of to a party not entitled to them. Cameron v. United States, 252 U.S. 450, 459-60 (1920); Knight v. United States Land Association, 142 U.S. 161, 181 (1891). As early as 1897, this principle was recognized as applicable to cases involving Indian allotments. Opinion, 24 L.D. 264 (1897). Indeed, the Secretary specifically concluded that he could rescind approval of an allotment application prior to issuance of a trust patent. Id. at 266. Thus, issuance of a certificate of allotment does not remove the land from public ownership or divest the Secretary of his authority to determine entitlement under section 4 of the General Allotment Act.

In addition, one of the prerequisites for entitlement to an Indian allotment under section 4 of the General Allotment Act is "settlement." 25 U.S.C. § 334 (1982). <sup>6/</sup> Since passage in 1934 of the Taylor Grazing Act, 43 U.S.C. § 315-316 (1982), settlement on the public lands has not been permitted until the Secretary first classifies the land for disposal. See 43 U.S.C. § 315f (1982); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). Therefore, in order to acquire an allotment outside a reservation in accordance with section 4 of the General Allotment Act, an Indian has to file a petition for classification and an allotment application, unless the lands previously have been classified and opened for disposition under the Act. 43 CFR 2531.2. In that case, only an application need be filed. However, if the land has not been classified, BLM must first determine whether the land may properly be disposed of under section 4 of the General Allotment Act. Following classification, BLM may approve the application. If it does so, a certificate of allotment is issued. 43 CFR 2532.1.

What is the effect of approval of the application and issuance of the certificate? Early Departmental regulations provided simply that, upon acceptance of an allotment application, the register would issue a certificate of allotment. 52 I.D. 383, 386 (1928). Acceptance of the application was based on a finding that the application was "in all respects complete." Id. at 388.

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<sup>6/</sup> Section 4 of the General Allotment Act, 25 U.S.C. § 334 (1982), makes allotments available to Indians who have made "settlement" upon lands of the United States not otherwise appropriated.

There is no indication that the register made any determination regarding compliance with the requirement of "settlement." In fact, the regulations provided that a copy of the certificate of allotment would be mailed to the "division inspector." Id. at 386. The division inspector was charged with, inter alia, reporting on the "character of the applicant's settlement and improvements." Id.

There is no suggestion in those regulations or in the present regulations that approval of the allotment application and issuance of the certificate of allotment means that BLM has resolved the question of "settlement." Indeed, in this case there is nothing in the record to reveal that BLM gave any consideration to the question of settlement prior to issuance of the certificate to Wallace. Rather the regulations indicate that an allottee's entitlement to a trust patent is contingent upon "his good faith and intention." 43 CFR 2532.2(a). The regulations provide that issuance of a trust patent will be suspended for a period of 2 years "from date of settlement" in order to enable an Indian allottee to demonstrate his good faith and intention. Id. 7/ Clearly, BLM is not required to issue a trust patent when the allottee has failed to demonstrate his good faith and intention, and it logically follows that BLM may cancel the certificate of allotment. Thus, there can be no gainsaying that BLM had the authority to cancel Wallace's certificate of allotment.

We turn now, however, to the question whether BLM properly exercised that authority in this case. Appellant first asserts that there is no requirement that one receiving a certificate of allotment make settlement within a particular period of time.

[2] There is no statutory time period for settlement principally because, as section 4 of the General Allotment Act operated prior to passage of the Taylor Grazing Act in 1934, settlement was a condition precedent to application for an allotment and patent. However, since enactment of the Taylor Grazing Act, settlement may only take place following classification of the land as suitable for disposal as an Indian allotment. See Saulque v. United States, 663 F.2d 968, 974 (9th Cir. 1981). In addition, there is no statutory requirement that settlement take place within any particular time period after classification. Nevertheless, when BLM issued the certificate of allotment in this case on June 5, 1979, it stated that "[t]wo years from the date of this notice, a trust patent will issue if there is evidence that the allottee has settled or otherwise occupied the land."

It appears that BLM equated "date of settlement" as used in 43 CFR 2532.2(a), with the date of issuance of the certificate of allotment, and afforded Wallace the 2-year period under that regulation to demonstrate

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7/ The regulation further states that when "that period has already elapsed at the time of adjudicating the allotment application, and when the evidence either by the record or upon further investigation in the field, shows the allottee's good faith and intention in the matter of his settlement, trust patents will issue in regular course." 43 CFR 2532.2(a).

"good faith and intention," prior to issuance of a trust patent. In any case, we find that BLM's requirement of establishing settlement within 2 years of the date of the certificate of allotment was reasonable. We have held that BLM may establish reasonable deadlines for accomplishing required actions. Bill Mathis, 90 IBLA 353, 355 (1986); Carl Gerard, 70 IBLA 343, 346 (1983). Although BLM took no formal action to extend that 2-year deadline, the record indicates that it was at least informally extended more than 4 years to December 1985, when the decision under appeal issued.

Appellant also asserts that cancellation was improper because he, in fact, settled on the land, and, thus, complied with section 4 of the General Allotment Act. "Settlement" is not defined in the Act or in the regulations. At one time the Department interpreted it "to mean practically the same as it does under the homestead law, where the essential requirement is actual inhabitancy of the land to the exclusion of a home elsewhere." Instructions, 32 L.D. 17, 19 (1903); see also Lacey v. Grandorf, 38 L.D. 553, 555 (1910). However, subsequent Departmental cases held that there was no requirement of actual residency under section 4 of the General Allotment Act. Charley Anderson, 47 L.D. 187, 190 (1919). See also Frank St. Clair, 52 L.D. 597, 601 (1929); Sacrestan v. Santa Fe Pacific Railroad Co., 46 L.D. 426, 428 (1918). <sup>8/</sup> Departmental regulations contained the following provision from 1918 to 1970:

While the act contains no specific requirements as to what shall constitute settlement, it is evident that the Indian must definitely assert a claim to the land based upon the reasonable use or occupancy thereof consistent with his mode of life and the character of the land and climate.

46 L.D. 344, 348 (1918); 52 L.D. 383, 387 (1928); 43 CFR 176.8 (1938); 43 CFR 176.8(b) (1954); 43 CFR 2212.1-2(b) (1970).

This provision was dropped from the regulations in June 1970 when the Indian allotment regulations were shifted from 43 CFR Part 2212 to 43 CFR Part 2530. 35 FR 9589 (June 13, 1970). There was no explanation for the deletion of the language. Likewise, there is no explanation in the present regulations governing Indian allotments of what constitutes settlement. <sup>9/</sup> Nevertheless, we find that it is appropriate to apply the long standing

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<sup>8/</sup> The reason for the shift in the requirement for "settlement" from "actual inhabitancy" to "use or occupancy" is perhaps explained by a Departmental awareness that, while the purpose of the General Allotment Act was to cause Indians to abandon their nomadic life in favor of the life of an independent settler living on and from his privately owned tract of land, a strict interpretation of the requirement consistent with the homestead laws was not in keeping with the habits of Indians generally and, thus, some accommodation had to be made in order to bring them under the influence of that Act and encourage the transition to a settled lifestyle. See Hopkins v. United States, 414 F.2d 464, 467-69 (9th Cir. 1969).

<sup>9/</sup> In 1965, there appeared in Departmental regulations governing classifications a regulation relating to Indian allotments. 43 CFR 2410.1-3(d)(6); 30 FR 12916 (Oct. 9, 1965). In June 1970 that regulation was moved to 43 CFR

Departmental interpretation of the requirement of "settlement", *i.e.* reasonable use or occupancy. See Vaden v. BLM, 96 IBLA 198, 206 n.14 (1987). <sup>10/</sup> Thus, BLM's conclusion that the certificate of allotment was cancelled because Wallace failed to establish "residency" on the allotment was erroneous. However, to the extent that BLM was attempting to indicate that Wallace had failed to make settlement of the land, cancellation of the certificate of allotment was proper. <sup>11/</sup>

[3] Where lands are classified for disposal as irrigable lands, as in this case, "settlement" must include acts to establish the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question. The record presently contains the following information regarding "settlement" of the land by appellant. In a November 25, 1985, memorandum to the file a BLM land law examiner recounted that a Tonapah Resource Area realty specialist stated that "there is no evidence that the allottee ever settled on or otherwise occupied the land. There are some fence posts along the boundaries of the subject 40-acre parcel." On the other hand, on appeal appellant alleges that he made settlement on the land. He asserts that he "built a fence, planted trees, placed a mobilhome [sic] on the property, and used it for storage of grain or hay" (Statement of Reasons at 4-5). He further alleges that he is "prepared to irrigate the land by transferring available water rights to it \* \* \*." Id. at 5.

Even accepting appellant's assertions as true, building a fence, planting trees, and moving a mobile home onto the land, and using it for hay or grain storage do not constitute settlement of 40 acres of irrigable land. As indicated, settlement in such circumstances must include actions directed toward accomplishment of the task of irrigation. Moreover, appellant has only alleged that he is prepared to irrigate the land by transferring water rights. There is no indication that he has sought transfer of water rights to this land or that transfer is even feasible. Nor has he alleged any actions taken on the ground to prepare the land for irrigation. <sup>12/</sup>

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fn. 9 (continued)

2410.1-3(f) (35 FR 9561 (June 13, 1970)), then subsequently to its present location at 43 CFR 2430.5(f). The text of the regulation, which is quoted at note 4, has remained virtually the same since 1965. Lands may be classified for Indian allotment as agricultural lands only if they are capable of providing a home and a livelihood for an Indian and his family. See Pallin v. United States, 496 F.2d 27, 34 (9th Cir. 1974); Hopkins v. United States, *supra* at 468-9. There is no present regulatory explanation, however, of what acts constitute settlement for purposes of allotment.

<sup>10/</sup> The Vaden case indicated that reasonable use and occupancy is required for settlement; however, prior Departmental interpretation, as indicated, required only such use or occupancy.

<sup>11/</sup> We assume for purposes of disposition of this appeal that BLM's classification action was proper. We note that under 43 CFR 4.410(a)(1), this Board has no authority to review a classification action by BLM.

<sup>12/</sup> We note also that appellant's statement on appeal that he is "prepared" to irrigate the land is totally inconsistent with his assertion in his



We conclude that cancellation of Wallace's certificate of allotment was proper because he failed to establish "settlement" of the lands in question. His request for a hearing is denied since even if we accept the truth of his representations on appeal, he failed to show that he made settlement of the land in question within the time established by BLM or at any time prior to BLM's decision.

The dissent finds error in the imposition of the requirement for establishing settlement of irrigable lands that acts of settlement must include acts to show the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question. The dissent states that "no such requirement is to be found, either in the General Allotment Act of 1887, Departmental regulations, or the allotment certificate."

What the dissent ignores is that both the Act and the regulations provide that land will be available for allotment in only three categories -- 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land. See note 2, supra. In 1978 BLM classified for allotment 40 acres of the 160 acres sought by Wallace. BLM then approved the allotment for 40 acres of irrigable land, requiring settlement within 2 years. BLM's classification and approval of the application constituted a determination that the land would support an Indian and his family. See 43 CFR 2430.5(f); see Hopkins v. United States, supra at 468.

To hold that Wallace may make "settlement" of that land by grazing, as the dissent implies, does not logically follow. The Secretary has determined that grazing, even 160 acres, would not support an Indian and his family. 13/ The Secretary has also rejected the option of 80 acres of nonirrigable agricultural land. 14/ Land was made available for allotment to Wallace as irrigable land.

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fn. 12 (continued)

Sept. 22, 1982, letter to BLM that the land "obviously \* \* \* cannot be irrigated." See note 5, supra. 13/ In the Dec. 26, 1984, land report relating to five separate Indian allotments, including the one in issue, BLM stated at page 1:

"Undeveloped grazing land in Fish Lake Valley is currently rated at 53 acres per animal unit month (AUM). This means that for cattle, one animal requires 53 acres to sustain itself for one month. One hundred sixty acres, then, would be capable of sustaining one animal for slightly more than three months. \* \* \* obviously, the income to be realized from grazing one animal for three months would hardly be considered a family income."

14/ The Dec. 26, 1984, land report at page 1 concludes:

"The second option under Indian Allotment, 80 acres for dry farming, is no more feasible economically than grazing 160 acres. \* \* \* No attempts to engage in dry farming in this area have been recorded in this century."

----- END FOOTNOTES -----

Remanding this case for a hearing, as the dissent proposes, to allow Wallace to show grazing use of the land 15/ is not consistent with the petition/application system established by the regulations. See 43 CFR Part 2430; 43 CFR Part 2450; 43 CFR Part 2530. The Secretary by his classification and approval of the 40 acres for allotment as irrigable land has determined that grazing use of the land is not economically feasible. The acts alleged by Wallace to have taken place on the land are insufficient to show settlement of irrigable land.

----- FOOTNOTES -----

----- END FOOTNOTES -----

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris  
Administrative Judge

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15/ The dissent states that "most importantly, he proposes to use the land for grazing his own animals," citing a 1983 letter. However, on appeal, Wallace claims that he is prepared to irrigate the land by transferring available water rights to it.

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN THE RESULT:

I agree that Wallace's certificate of allotment must be cancelled for the first reason given in BLM's December 19, 1985, decision, namely, that before the certificate was issued his application to appropriate underground water for irrigation purposes was denied by the State Engineer of Nevada on the grounds that such an appropriation would "tend to impair the value of existing rights and be otherwise detrimental to the public interest and welfare."

Will A. Irwin  
Administrative Judge.

## ADMINISTRATIVE JUDGE ARNESS DISSENTING:

I agree generally with the principal points of law made by the lead opinion. It is clear that the Secretary must have the power to cancel an Indian certificate of allotment if settlement is not made within the term allowed by the certificate. Certainly, also, because section 4 of the General Allotment Act of 1887 does not define the term "settlement," what constitutes "settlement" by an Indian who holds a certificate of allotment can best be determined in accordance with prior Departmental rules and case precedent. This means that, as the lead opinion observes, consistent with the Indian's mode of life and the character of the land and climate, we must determine whether he has shown facts which establish reasonable use and occupancy. If he has, we must find he has made settlement upon the land.

It is at this point that the lead opinion falls into error by drawing the unwarranted assumption that, in this case, Wallace was required by his circumstances to establish that he had taken action toward irrigating the 40-acre tract certified to be subject to allotment to him. For no such requirement is to be found, either in the General Allotment Act of 1887, Departmental regulations, or the allotment certificate. On the contrary, to establish a satisfactory use and occupancy, one must look to the circumstances of the individual case to determine whether there has been such use and occupancy as will establish the claimant's good faith and intention. See 52 I.D. 383, 387 (1928). While this inquiry may include consideration of such matters as the existence of irrigation works, there is no requirement that such activity be established to the exclusion of all other uses. See Henrietta Roberts Vaden, 96 IBLA 198, 206 n.14 (1987).

Whatever activity may ultimately be found to establish settlement in a given case, it does not appear that Congress intended that Indians settling on public lands outside an Indian reservation were to be governed by different rules respecting such settlement than those who were allotted on reservations. Section 4 of the General Allotment Act of 1887, as amended, 25 U.S.C. § 334 (1982), provides that public domain lands shall be allotted "in the same manner as \* \* \* for Indians residing upon reservations." See generally in this regard, Hopkins v. United States, 414 F.2d 464 (1969). 1/

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1/ There is a suggestion in the record that the cancellation of Wallace's certificate was prompted by a 1982 memorandum from an Assistant Solicitor for the Department. This memorandum, which is included in the file, seems to be based upon a misreading of Hopkins v. United States, supra, since it concludes that the Department may not consider the effect of ownership of other lands of the allottee when evaluating whether the allotment is capable of supporting an Indian and his family. This is plainly an error, since

The classification of the 40-acre tract applied for by Wallace as irrigable land should not, therefore, in any way alter the character of the activity needed to establish his settlement under the Act. 2/ The Allotment Act encourages activity of a pastoral nature: so long as Wallace's activity fits into that general pattern of conduct, it should be effective to show his intention and good faith towards making the required settlement. The fact the 40-acre tract was classified irrigable by BLM in no way alters the general rule respecting settlement of such allotments by Indians. He should be allowed to show that he has settled upon the tract which was opened to his entry by proving the nature of the use made by him of the land.

As the lead opinion points out, Wallace claims to have used and occupied the 40-acre tract subject to his entry by fencing, planting trees, and storing hay and grain and a mobile home on the land. Additionally, and perhaps most importantly, he proposes to use the land for grazing his own animals and proposes to exclude his competitors stock from the area. See letter dated October 5, 1983, Wallace to former Secretary Watt. This use may, depending upon his personal circumstances, the amount of available grazing land, and the competitive climate in the Fish Lake Valley, be as important as any other. Under the circumstances, I would order a hearing into the matter to permit Wallace the opportunity to show exactly how he has used and occupied this tract. While there may not be enough of a showing on the present record to fully demonstrate settlement, there is a sufficient claim of right now appearing of record to raise a material issue of fact so as to require a hearing before this matter can be decided. See, e.g., Minchumina Homeowners Association, 93 IBLA 169 (1986); Matilda Titus, 92 IBLA 340 (1986).

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fn. 1 (continued)

Hopkins explains, at note 5 to the opinion, that "[i]t is clear that allotments sought by or on behalf of all members of an Indian family are to be aggregated in order to determine the economic viability of the resulting unit." *Id.* at 468. In this case, therefore, BLM correctly aggregated the value of the allotment with other lands when it valued the lands and classified the 40-acre parcel for allotment.

2/ The court in Hopkins at 414 F.2d 472-13 discusses the interaction of section 7 of the Taylor Grazing Act, 43 U.S.C. § 315 (1982), with section 4 of the General Allotment Act of 1887: the court, after refraining from holding that the Taylor Grazing Act repealed the provision of the Allotment Act permitting allotment of grazing lands, indicates that the Secretary may "condition entry and settlement upon a prior classification of lands as suitable under the [General Allotment] Act." This indicates that the Secretary, having allowed entry for Indian allotment, must then apply the standards of the Allotment Act rather than the Grazing Act to determine questions of eligibility and settlement. To do otherwise, as the Hopkins court implies, would be to repeal the General Allotment Act insofar as allotments of grazing lands are concerned.

Since the lead opinion's exaggeration of the importance to this decision of the irrigation classification by BLM leads to a contrary result, I am obliged to respectfully dissent. 3/

Franklin D. Arness  
Administrative Judge.

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3/ In footnotes 13, 14, and 15, the lead opinion calls attention to the fact that there are inconsistencies in the uses proposed by Wallace for his 40-acre allotment. Those anomalies may be caused in part by the fact that allotment was originally sought by Wallace for 160 acres rather than 40 acres upon which entry was allowed. But the disparity between Wallace's estimate of the utility to him of the land and the opinion of BLM's experts concerning its value serves only to reinforce the need for a hearing rather than to show that none is required. The fact that an Indian disagrees with the Department's experts concerning land usage does not necessarily mean that the Indian is wrong. See, e.g., Clark v. Benally, 51 I.D. 91 (1925), where it was observed, despite the opinion of the Geological Survey, concerning members of the Navaho tribe who had settled upon poor land that "\* \* \* the Department can not arbitrarily deny them allotments on the ground that the lands are too poor in quality." Id. at 93. It is certainly true, as First Assistant Secretary Finney observed, when considering a rehearing of the Benally case, that "Congress may impose such conditions on the taking of lands under [section 4 of the General Allotment Act] as it may see fit." Clark v. Benally (On Rehearing), 51 I.D. 98, 101 (1925). But there is no act of Congress which permits this Department to simply deny Indian settlement upon poor lands.

